# Southern Finance Co Bhd v Metro Angkasa Sdn Bhd

HIGH COURT (KUALA LUMPUR — ORIGINATING SUMMONS NO S2(S1)–24–1015 OF 1997
KAMALANATHAN RATNAM J
4 MAY 2000

***Land Law*** *— Sale of land — Order for — Application for — Merger of banks, whether plaintiff entitled to continue action in original name as filed — Multiple charges — Whether plaintiff entitled to proceed on first charge only — Dispute as to interest, whether plaintiff has right to charge extra interest—Whether order should be granted*

The defendant charged his property to the plaintiff and obtained a term loan of RM8m and a bridging loan of RM2.5m ('the first charge'). Subsequently the defendant created a second charge also in favour of the plaintiff for a term loan of RM3m ('the second charge'). Upon default of payment by the defendant, the plaintiff proceeded with the application for an order for sale. The defendant submitted that: (i) the plaintiff had no capacity to sue because the plaintiff is now called Southern Bank Bhd; (ii) the final affidavit of the plaintiff referred to the outstanding sum of RM10.5m in respect of the first charge. Referring to the second charge of RM3m, the defendant contended that since this figure was not included in the final affidavit, the omission was fatal to these foreclosure proceedings; and (iii) the plaintiff had no power to charge the extra 1% interest.

**Held**, allowing the plaintiff's application:

(1) By an order of the High Court, both the plaintiff and Southern Bank Bhd have since merged. Clause 13 of the order gave the plaintiff the right to continue with the action in the original name as filed (see p 549B–C).

(2) The plaintiff was proceeding on the first charge. The charges, rights and powers flow from the provision of the National Land Code 1965 with the charge taking effect as a security only to obtain a judicial sale. The plaintiff was therefore clearly entitled to proceed on the first charge itself (see p 549E–F); *Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Bhd* [1997] 2 MLJ 805 followed.

(3) There was in the annexure a clause giving the plaintiff the right to vary the interest. Further, this was a claim in rem. Any dispute regarding excessive charges by way of interest ought to be claimed by the defendant by way of civil action (see p 549G).

**[Bahasa Malaysia summary**

Defendan telah menggadaikan hartanahnya kepada plaintif dan memperolehi suatu pinjaman bertempoh sebanyak RM8j dan satu

pinjaman perantaraan sebanyak RM2.5j ('gadaian pertama'). Berikutnya defendan telah mewujudkan gadaian kedua yang juga atas nama plaintif untuk satu pinjaman bertempoh sebanyak RM3j ('gadaian kedua'). Atas keingkaran bayaran oleh defendan, plaintif telah meneruskan dengan satu permohonan untuk perintah jualan. Defendan berhujah bahawa: (i) plaintif tidak berkeupayaan untuk mendakwa kerana plaintif kini digelar Southern Bank Bhd; (ii) afidavit muktamad plaintif merujuk kepada jumlah yang belum dibayar sebanyak RM10.5j berkaitan dengan gadaian pertama. Merujuk kepada cagaran kedua sebanyak RM3j, defendan berhujah bahawa oleh kerana jumlah ini tidak termasuk dalam afidavit muktamad, peninggalan tersebut padah kepada prosiding penutupan gadai janji ini; dan (iii) plaintif tidak berkuasa untuk mengenakan faedah tambahan sebanyak 1%.

**Diputuskan,** membenarkan permohonan plaintif:

(1) Melalui satu perintah Mahkamah Tinggi, kedua-dua plaintif dan Southern Bank Bhd telah bercantum. Fasal 13 perintah tersebut memberikan plaintif hak untuk meneruskan tindakan dalam nama asal seperti yang difailkan (lihat ms 549B–C).

(2) Plaintif bertindak atas gadaian pertama. Gadaian, hak dan kuasa berpunca dari peruntukan Kanun Tanah Negara 1965 dengan gadaian mengambil efek sebagai satu cagaran sahaja untuk memperolehi jualan kehakiman. Maka plaintif jelas berhak meneruskan atas gadaian pertama sendiri (lihat ms 549E–F); *Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Bhd* [1997] 2 MLJ 805 diikut.

(3) Wujud satu fasal dalam lampiran yang memberikan plaintif hak untuk mengubah kadar faedah. Tambahan pula, ini merupakan satu hak dalam rem. Sebarang pertikaian berhubung dengan cagaran yang melampau disebabkan faedah seharusnya dituntut oleh defendan melalui tindakan sivil (lihat ms 549G).]

**Notes**

For cases on order for sale of land generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 3030–3101.

**Cases referred to**

*Kimlin Housing Development Sdn Bhd & Ors v Bank Bumiputra (M) Bhd* [1997] 2 MLJ 805 (folld)

*Leonard Yeoh* (*Soo Thien Ming & Nashrah*) for the plaintiff.
*TY Teh* (*TY Teh & Partners*) for the defendant.

**Kamalanathan Ratnam J:**

*Facts*

The defendant is the registered owner of land held under Title No HS (D) 10045, No PT 3980, Mukim Gemas, Daerah Tampin, Negeri Sembilan ('the property'). On 6 February 1996, the defendant charged the said property to the plaintiff and obtained a term loan of RM8m and a bridging loan of RM2.5m upon terms and conditions contained in the charge ('the first charge'). On 12 June 1996 the defendant created a second legal charge upon the said property also in favour of the plaintiff for a term loan of RM3m upon terms and conditions contained in the said charge ('the second charge').

The terms and conditions inter alia were:

(a) that the defendant would be charged interest at the rate of 2% above the BLR on a monthly rest;

(b) that the plaintiff has the discretion to vary the rate of interest;

(c) that the defendant would pay a penalty interest of 1% pa on the outstanding amount;

(d) that the total term loan in respect of the first charge be repaid in 16 instalments of RM500,000 per instalment; and

(e) that the total term loan in respect of the second charge be repaid in 16 instalments of RM187,500 per instalment.

Since the defendant defaulted in payment the plaintiff bank sent a notice of demand and at the same time also demanded by way of the statutory notice through Form 16D, the sum of RM9,954,498 as at 1 August 1997. The plaintiff thus proceeded with this application for an order for sale. On 4 May 1998, the defendant entered appearance through the present solicitors. Subsequently on 25 June 1998, the defendant even filed an application to transfer these proceedings to the High Court at Seremban on the basis that the land in question comes within the jurisdiction of the Seremban High Court. Further the defendant filed an affidavit encl 19 disputing the sum owed and also contending that he never received any notice indicating that the plaintiff intended to vary the rate of interest.

*The plaintiff's claim*

The plaintiff claims an order for sale of the said property and for consequential orders.

*Fiindings of the court*

Competency of the plaintiff

The defendant first attacked the competency of the plaintiff to sue. Whilst the plaintiff has been suing in its original capacity, namely, Southern

A Finance Co Bhd, the defendant argued that by an order of the High Court at Kuala Lumpur in D3–24–88–1999 dated 17 March 1999, the plaintiff is now called Southern Bank Bhd. The defendant then submitted that because of this the plaintiff, suing as it did, had no capacity to sue. When this court asked counsel for any authority to support his proposition, counsel said he had none. I have repeatedly emphasised the need for
B counsel to come fully prepared to court to argue his case for his client.

The plaintiff has exhibited this order in its affidavit in reply which showed that pursuant to a Scheme of Merger, both the plaintiff and Southern Bank Berhad have since merged. If counsel for the defendant was unable to submit any authority in support of his view, he ought to have at
C least read this order since cl 13 reads as follows:

> All legal, arbitration, tribunal and other proceedings which are pending and in or to which Southern Finance Co Bhd is a party may be continued as if Southern Bank Bhd had been a party thereto instead of Southern Finance Co Bhd.

D To my mind this clause gives the plaintiff the right to continue with the action in the original name as filed.

The second issue taken by the defendant relates to the amount outstanding. The defendant referred to the final affidavit of the plaintiff which referred to the outstanding sum of RM10.5m in respect of the first
E charge. Referring to the second charge of RM3m, the defendant contended that since this figure was not included in the final affidavit, the omission was fatal to these foreclosure proceedings.

The plaintiff is proceeding on the first charge. In *Kimlin Housing Development Sdn Bhd & Ors v Bank Bumiputra (M) Bhd* [1997] 2 MLJ 805 (SC) the then Supreme Court held that the charges, rights and powers flow
F from the provision of the National Land Code with the charge taking effect as a security only to obtain a judicial sale. The plaintiff is therefore clearly entitled to proceed on the first charge itself.

Computation of interest

G The defendant argued that the plaintiff had no power to charge the extra 1% interest. The answer to this is also straightforward and simple. There is in the annexure a clause giving the plaintiff the right to vary the interest. Further this is a claim in rem. Any dispute regarding excessive charges by way of interest ought to be claimed by the defendant by way of a civil
H action.

In the circumstances, as the plaintiff had shown by way of affidavit evidence that the sum owing as of the date of the hearing was RM15,055,114.03, I entered judgment for the plaintiff as follows:

(a) that the said property be sold by public auction to recover the sum of
I RM15,055,114.03 with further interest;

(b) that the auction be fixed on 17 April 2000;

(c) that the senior assistant registrar do fix a reserve price for the auction;

(d) that the senior assistant registrar fix a reserve price for the purpose of auction at a price equivalent to the market value of the land as assessed;

(e) that the relevant authority register the name of the buyer or buyers of the land; and

(f) costs to be taxed.

*Plaintiff's application allowed.*

Reported by Jafisah Jaafar